

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE C. COLEMAN,

Appellant,

vs.

No. 22069

LAWRENCE E. WILSON, Warden,
San Quentin State Prison,
et al.,

Appellees.

APPELLEES' PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

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TO THE HONORABLE WALTER L. POPE, JAMES R. BROWNING, AND
JAMES R. CARTER, CIRCUIT JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to Rules 35(b) and 40 of the Rules for
Appellate Procedure, Title 28, United States Code, Appellees,
Lawrence E. Wilson and the People of the State of California,
hereby petition for a rehearing and suggest a rehearing in
banc to consider this Court's per curiam order filed in this
action on October 8, 1968.

This court, in its per curiam decision, stated that
conflicts presented by the petition and the affidavit could
not be resolved without an evidentiary hearing, and cited two
cases as supporting authority: Machibroda v. United States,
368 U.S. 487, 494, 496 (1962); Wright v. Dickson, 336 F.2d
878, 882-83 (9th Cir. 1964). Wright, in turn, relied also on
Machibroda, and on Pennsylvania ex rel. Herman v. Claudy, 350

U.S. 116, 118-119, 123 (1956), and Walker v. Johnston, 312 U.S. 275, 286-87 (1941).

While this Court's statement, as an abstract generality, may be a correct statement of the law as developed in the cases cited, the Court's order is erroneous for two reasons: First, the assertion that the factual conflict is between appellant's statements and his counsel's affidavit overlooks the fact that appellant's statements in all important respects are contradicted, both directly and by appropriate inference, by his own statements either recorded at plea and sentencing or made in documents filed in this Court; and second, the court both misapplied the cited decisions and failed to consider explicit statutory language (28 U.S.C. 2246) by holding, in effect, that no use of an evidentiary affidavit could be made to determine whether there was any substantial issue of fact to be resolved at an evidentiary hearing.

Appellees respectfully suggest a hearing in banc because the questions raised are of substantial importance to the orderly consideration of issues arising in federal habeas corpus proceedings. The practical effect of the Court's decision is to preclude any exercise of discretion by the district court. Every plea of guilty entered in either state or federal proceedings will now be subject to a mandatory evidentiary hearing on the mere artful allegations of a prisoner, despite the fact that his allegations are not only refuted by the record but are assured of no other evidentiary support.

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ARGUMENT

The record in this case shows that appellant and a co-defendant, each represented by separate counsel, were permitted to withdraw their pleas of not guilty and enter pleas of guilty to two counts of robbery. Following sentencing, seven additional counts of robbery, and two of kidnapping, were dismissed. Under California law, a death sentence could have been imposed had appellant been found guilty of the kidnapping.

At the time the plea was taken, appellant's co-defendant was examined first, and inter alia, was asked whether there had been any promises of reward or lesser sentence or probation (CT 109). The proceedings then continued with respect to appellant, in pertinent part as follows:

"MR. O'NEILL: Now with respect to defendant Coleman, your Honor, I have counselled with him and advised him of his constitutional rights and have discussed the charges with him, have discussed the alternatives that are open to him in this matter. Mr. Coleman advises me that he desires to make his plea as to counts 2 and 7 of the Information in this case. He also tells me that he wishes to admit the allegations of prior conviction.

"THE COURT: Take the plea.

"MR. McCORMICK: Your name is Willie C. Coleman, is that correct?

"DEFENDANT COLEMAN: Yes, sir.

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"MR. McCORMICK: Mr. Coleman, you understand the charges that have been placed before you and brought you here to Court this morning, do you not?

"DEFENDANT COLEMAN: Yes.

"MR. McCORMICK: And you have discussed this matter with Mr. O'Neill, your lawyer?

"DEFENDANT COLEMAN: Yes.

"MR. McCORMICK: You have indicated, through him, that it is your desire at this time to plead guilty to two counts contained in that Information, . . . Count Two charges you with the crime of robbery and Count Seven charges you with the crime of robbery. Do you understand that?

"DEFENDANT COLEMAN: Yes.

"MR. McCORMICK: And it is your desire at this time to plead guilty to those two Counts, is that correct?

"DEFENDANT COLEMAN: Yes.

"MR. McCORMICK: Mr. Coleman, you are doing this because you believe you are guilty of those two counts?

"DEFENDANT COLEMAN: Yes, sir.

"MR. McCORMICK: There has been no threats or promises made to make you plead guilty, have there?

"DEFENDANT COLEMAN: No.

"MR. McCORMICK: You're doing it freely and voluntarily?

"DEFENDANT COLEMAN: Yes." (CT 111-113).

Appellant's plea was then entered.

Appellant has not denied the accuracy of this record, nor has he made any explanation of his failure to apprise the trial judge of the "threats" made by his attorney if such threats had in fact been made. In such circumstances, the record itself conclusively establishes that no threats were made. It was this record which was relied on by the trial court. See CT 145-46. The affidavit of counsel established, in addition, that no evidentiary support for his allegation could be obtained.

Appellant's allegation that he did not know the consequences of his plea is also refuted by appropriate inferences to be drawn from the record and the papers filed by appellant. The transcript of the proceedings on sentence, quoted above, establish that appellant and his counsel both informed the court that the matter had been discussed and that appellant understood the charges. Counsel informed the court that he had discussed with appellant the alternatives open to him. Appellant admits that he was informed of the penalty for kidnapping. His allegations concerning the expectation of probation compel the inference that he knew a prison sentence was a possibility. The actual term he would serve could not be predicted under California law. Thus, the only remnant of his allegation is that he was unaware that the maximum term was life. In view of this record, that allegation could properly be considered frivolous by the court. The use of an affidavit to establish that, as to this insubstantial factual issue, further inquiry would produce no support for appellant's position is an eminently reasonable exercise of judicial discretion resulting

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both in fairness to appellant and a conservation of valuable judicial time, and is entirely in accord with both the letter and the spirit of cases interpreting the duty of a federal district judge in habeas corpus matters.

In Machibroda v. United States, supra, the petitioner moved under Title 28, United States Code, section 2255 (applicable to federal prisoners only) to set aside a plea of guilty on grounds that it had been induced by promises of leniency by the prosecuting attorney. The petitioner filed detailed accounts of promises made by the prosecuting attorney, on three different occasions, identified as to time and place. In addition the petitioner alleged that the prosecuting attorney had told him that if he informed his attorney or the court, "insisted on making a scene," unsettled matters concerning two other robberies would be added to his difficulties. Id. at 489-490. The prosecuting attorney filed an affidavit denying the promises or coercion, but admitting that he told the petitioner that, in testifying at the trial of an accomplice, he was to be given his last opportunity to tell the truth, a factor which might well be considered by the sentencing court. The case is silent as to what transpired at the plea taking, except that the petitioner had stated that his plea was voluntary. Id. at 482 (dissenting opinion). The Supreme Court held that a hearing was required in these circumstances:

"There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual allegations of the petitioner, while improbable, cannot at this juncture be said to

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be incredible. If the allegations are true, the petitioner is clearly entitled to relief. . . ."

If Machibroda is "not far from the line," the instant case is well over on the other side. Here petitioner neither contested the statements on the record nor explained why he made them if they were not true. Thus, the record conclusively establishes that he was not threatened. The record and appellant's statements show that he was told the penalty for kidnapping, and was aware that probation was the alternative to a prison sentence. It is a reasonable inference from these facts and from the statements of both appellant and his counsel that they had discussed the matter, that he was also informed of the maximum penalty for robbery.

Next, the court in Machibroda rejected the government's argument that a hearing would be futile in view of the prosecuting attorney's affidavit because,

"It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail, the mail records of the penitentiary to which he was sent, and other sources."

Id. at 495.

In the instant case, a hearing would be the ultimate exercise in futility. The affidavit of counsel shows that appellant's allegations, incredible on the record alone, will not have any evidentiary support. Thus, there is simply no substantial issue of fact to be resolved in a hearing.

The facts in Wright v. Dickson, supra, are also in

sharp contrast to those in the instant case. In Wright, the defendant had entered a plea of guilty without counsel. He alleged that he had not knowingly and intelligently waived counsel. The state filed copies of the Clerk's Transcripts, not the Reporter's Transcripts, of proceedings in the justice court, and in the Superior Court. These transcripts stated that petitioner had been advised of his right to counsel in both courts and that he had waived counsel in Superior Court before entering his plea. An affidavit of the district attorney stated that prior to the entry of the plea, he had advised the defendant that he had the right to be represented by counsel and that the defendant entered his plea freely and voluntarily. Thus, the petitioner's claim that he had not knowingly waived counsel, a legal conclusion, was not directly refuted by either the record or the affidavit. The "fact" in the record which petitioner was allowed to dispute, was, at best, the judge's opinion. Had there been a Reporter's Transcript which established the facts of the hearing, from which the district judge could make his own determination of proper waiver, no challenge to the record could be made. See Walker v. Johnston, supra, at 284.^{1/} In the instant case there is no dispute that the record is accurate and no legal conclusions are stated therein.

1. "By [issuing an order to show cause which the respondent answers] the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from indisputable facts or from incontrovertible facts, such as those recited in a court record, it appears as a matter of law, no cause for granting the writ exists." (Emphasis added).

In Wright, this Court recognized that substantial issues of fact must exist before the district court is required to grant an evidentiary hearing. Id. at 881.^{2/} To the extent that the opinion may be read to preclude the use of affidavits for any purpose, we submit that it is in error. Walker v. Johnston, supra, relied on by this Court for both of the above propositions, held only that substantial issues of fact could not be decided solely on ex parte affidavits. Walker, where petitioner, as in Wright, entered a plea of guilty without counsel, also involved a claim of unintelligent waiver of counsel. Again, the affidavit referred to was one by prosecuting officials, and there was apparently no transcript to which the court could refer.

In each of these cases, the allegations of the petitioner raised substantial issues of fact which were not contravened by the record but rather, either wholly or principally, only by the affidavits of prosecuting officials. This is not the factual posture in the situation at issue here.

Finally, this Court has failed to explain or interpret the clear statutory language which provides that affidavits are admissible as evidence, 28 U.S.C. 2246. If they are admissible, obviously they may be considered by the court even in the resolution of substantial issues of fact. A fortiori, they may be considered in determining that no substantial

2. The court cited Pennsylvania v. Claudy, 350 U.S. 116, 118-19 (1956): An order to show cause may be dismissed without a hearing if the factual allegations are "patently frivolous or false on a consideration of the whole record . . ." This case also involved a plea in the absence of counsel and a claim of waiver; it could not be dismissed merely because a state prosecuting official filed a denial.

factual issue exists. See Copenhaver v. Bennett, 355 F.2d 417 (8th Cir. 1966). Since the section was enacted subsequent to Walker, the issue cannot be resolved by that case even where substantial factual issues are involved.

In Townsend v. Sain, 372 U.S. 293, 319 (1963), the United States Supreme Court recognized the problems involved in evidentiary hearings:

"We are aware that the too promiscuous grant of evidentiary hearings on habeas corpus could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their permanent responsibility in this area."

This Court's decision in the instant case takes this discretion away from the district judge and gives it to the prisoner, with the inevitable result that the validity of every guilty plea, state or federal, is open to contest in an evidentiary hearing. That this will both "swamp the dockets of the District Courts and cause acute and unnecessary friction" can hardly be doubted.^{3/}

3. It also encourages perjury, since any claim outside the record assures the prisoner the excitement of a trip to court. See Weller v. Dickson, 314 F.2d 598, 602 (9th Cir. 1963) (Circuit Judge Duniway, concurring). The increased difficulties of rehabilitation should be obvious.

Compelling as these considerations are, there is, in a case such as this where an attack is made on defense counsel, one further consideration which bears directly on those rights of a criminal defendant, the protection of which is the purpose of the writ. Here, a defendant represented by counsel, was advised by that counsel and in response to such advice entered pleas to two counts of a multi-count information. Other charges, including those for which the death penalty was a possible punishment, were dismissed. Counsel informed the court that he had discussed the charges, the alternatives, and his constitutional rights with the defendant. The defendant affirmed this in open court, affirmed that no promises or threats were made, and stated that his pleas were entered freely and voluntarily because he was guilty. All this is indisputably shown by the record. In addition, an affidavit of counsel affirms the correctness of the record. Despite obviously frivolous allegations, a defendant is permitted to place his counsel in the unenviable position of facing his former client in court to defend himself and his reputation. We submit that faced with such a future prospect at the whim of his client rather than in the sound discretion of a judge, few counsel will be able to give that impartial and wholehearted representation which is the defendant's right under the constitution.^{4/} Thus, a procedure whose purpose is to secure rights will be a major instrument of their effective denial.

4. A similar problem has been recognized by this Court. See Kuhl v. United States, 370 F.2d 20 (9th Cir. 1966); Nelson v. California, 346 F.2d 73 (9th Cir. 1965).

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CONCLUSION

For the above reasons, we respectfully urge this Court to grant a rehearing in banc, and to affirm the order of the district court.

Dated: October 22, 1968.

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